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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71 - 566

SAM FORD FISHBEIN and
LEONARD YORDON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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October 20, 1971

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No.....

SAM FORD FISHBEIN and
LEONARD YORDON,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Petitioners, Sam Ford Fishbein and Leonard Yordan, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 28, 1971.

OPINION BELOW

The opinion below, not yet reported, appears in the appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 28, 1971. A timely petition for rehearing was denied on September 23, 1971, and this Petition for Certiorari was filed within

thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether adverse collateral consequences flow from the refusal of the Court of Appeals for the Ninth Circuit to review thirteen of the fifteen counts upon which a finding of guilty was returned on a 22-count indictment.

2. Whether 28 U.S.C. §2106 is authority for the action of the Circuit Court of Appeals for the Ninth Circuit in vacating the Judgment of conviction on thirteen counts without directing the vacation of the jury verdict as to these counts.

3. Whether the refusal of the Circuit Court of Appeals for the Ninth Circuit to finally dispose of the thirteen counts of an indictment taints the jury verdict as to the remaining two counts.

4. Whether the failure of the prosecution to make timely disclosure of material which was exculpatory in nature and of substantial value in preparing for crossexamination of material government witnesses was error requiring reversal.

5. Whether the Circuit Court of Appeals for the Ninth Circuit was in error in failing to consider the neglect of the Trial Judge to give an accomplice instruction.

STATUTORY PROVISIONS INVOLVED

United States Code Title 28 §2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such

appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

Sam Ford Fishbein and Leonard Yordon were indicted on a 22-count indictment returned before the District Court for the District of Arizona. The indictment embraced 22 counts as follow;

Count 1 (conspiracy), 18 U.S.C. §371; Counts 2 to 15 (fraud in the sale of securities), 15 U.S.C. §77q (a); Counts 16 and 17 (sale of unregistered securities), 15 U.S.C. §77e (a) (1); Counts 18 and 19 (delivering unregistered securities by mail), 15 U.S.C. §77e (a) (2); and Counts 20, 21 and 22 (use of mails to defraud), 18 U.S.C. §1341.

The cause was tried to a jury and the Court entered Judgments of Acquittal as to Counts 9 and 20 as to Fishbein and Counts 3; 8; 16; 18; 19 and 22 as to Yordon. The jury returned a verdict of guilty on Counts 1; 2; 3; 4; 5; 6; 7; 8; 10; 11; 12; 14; 15; and 21 and not guilty as to Counts 16; 17; 18; 19 and 22 as to Defendant Fishbein; and guilty of counts 1; 2; 4 and 8 and not guilty of counts 16; 18 and 19 as to Yordon.

In June of 1971 Fishbein and others acquired an interest in six motels, two of which were located in Phoenix, Arizona, and one each in the cities of Tucson, Arizona; Houston, Texas; Tulsa, Oklahoma; and San Diego, California. This group then organized Hiway-House Hotels, Inc. and transferred the motels to it in exchange for 150,000 shares of common stock in the corporation with a par value of one dollar per share. The corporation then offered to the public within the State of Arizona 225,000 shares of common stock at a

price of $4.80 per share. HiwayHouse itself employed a group of salesmen and conducted the promotion. Defendant Yordon, a brother-in-law of Fishbein, became associated with HiwayHouse in several capacities and participated in the stock sales.

HiwayHouse never generated sufficient resources to meet all its obligations during the period it operated. Defendant Fishbein left the corporation and Defendant Yordon continued in some capacity until the turnback of the properties to the original seller in 1964.

The indictment was returned on June 2, 1966. Of the original ten defendants, two, George Gottfried and Sol Tropp, pled nolo contendere as to one or two counts and eventually testified as government witnesses. Severances were granted as to others, and eventually the case proceeded to trial against Fishbein, Yordon, Jablonka and Schwartz.

The two stock salesmen, Jablonka and Schwartz, were eventually found not guilty, either by judgments of acquittal or by not guilty verdicts of the jury.

Matters giving rise to this petition are necessarily limited in scope. Considerable pretrial discovery was granted by the Trial Judge. However, as no grand jury minutes were kept, and no transcript was made of the evidence before the grand jury, no grand jury proceedings were available to the defendants. The last pretrial order directed the Government to furnish ten days in advance of trial all information intending to show the absence of guilt of the accused.

During the course of the trial it became apparent that much of the material made available to the grand jury was in the form of investor questionnaires sent out by the Securities Exchange Commission. Many of these questionnaires involved persons who were not

grand jury witnesses nor listed as trial witnesses, but were named as persons defrauded in the several counts of the indictment. Midway through the trial, which lasted some 10 trial days, these questionnaires were produced for inspection by defense counsel. As the result of the question of the availability of these documents being raised on the initial appeal, an Order of Remand was made, and at a subsequent hearing a sampling of these questionnaires was presented to the Trial Judge as Exhibits 1 through 85. The Trial Judge determined that no defendants' rights under ***Brady vs. Maryland,*** 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), had been violated, and the Circuit Court of Appeals concurred in this holding in its ultimate disposition of the case. These questionnaires contained statements of investors quoting stock sale representations as made to them such as: "Nothing I would consider very important" (supp. exhibit No. 1). "Salesman informed me they had bought — a few of the HiwayHouse Motels and intended to add more later. We were not pressured." (supp. exhibit No. 2). "The salesman told us it was a ground floor stock and had good chance of splitting in the near future. However, he did tell us that it might not be worth anything." (supp. exhibit No. 4). "Normal sales approach — no outlandish claims. I requested a prospectus and was visited by a salesman, name unrecalled, who represented a firm, again not recalled, charged with the job of selling securities in HiwayHouse." (supp. exhibit No. 7). Many statements of similar vein were included in the rest of the supplemental exhibits 1 through 85.

In disposing of the case the Circuit Court of Appeals noted that the appeal "* * * * bristles with difficult legal and factual problems. The factual problems arise on an unindexed record consisting of 2154 pages and about 240 exhibits. To get to the merits we

would need to examine the record to determine the sufficiency of the evidence as to each count." (In the Motion for Rehearing it was pointed out that the record was indexed, but the index was in a separate volume. The Circuit Court acknowledged this in the Order Denying the Rehearing.)

As to Fishbein the Court vacated the Judgments of Conviction as to counts 2; 4; 5; 6; 7; 8; 10; 11; 12; 13; 14; 15 and 21 and affirmed as to counts 1 and 3, under the authority of 28 U.S.C. §2106, and *United States vs. Hooper,* 432 F. 2d 604 (D.C. Cir. 1970), but expressly refused to vacate the jury verdict as to these counts. It authorized the Trial Judge to reinstate the counts if Fishbein violated the terms of his probation. As to Yordon, the Judgment was affirmed as to count 1 and reversed as to counts 2; 4 and 8.

Thus, Fishbein is left in a state of limbo on the vacated counts.

The Court refused to consider the fact that no accomplice instruction was given on the basis that none had been requested. When this was challenged in the Motion for Rehearing and a copy of the instruction furnished, the Circuit Court observed it did not understand the reference to proposed Instruction 12 as it did not deal with the testimony of an accomplice.

A copy of this requested instruction is a part of the appendix to this Petition.

REASONS FOR GRANTING THIS WRIT

1. ***The Decision Below Fails to Dispose of the Guilty Verdict on 13 Counts and Leaves the Defendant Fishbein in a State of Limbo as to these Counts, and Ignores the Collateral Consequences that May Flow From These Unresolved Verdicts.***

The Court of Appeals, in its decision not to review the 13 counts but to vacate the Judgment but not the jury verdict, cited *United States vs. Hooper,* 432 F. 2d 604 (D. C. Cir. 1970), as authority. Hooper recognized that the concurrent sentence doctrine, whereby the Appeal Courts need not review some counts if sustainable counts supported the sentence as enunciated in *Hirabayashi vs. United States,* 320 U.S. 81, 63 S. Ct. 1375; 87 L. Ed. 1774 (1943), was a doctrine whose existence could not be satisfactorily explained. The Court in *Hooper* resolved the question by vacating the Judgment without any specific direction as to the verdict, noting, however, in footnote 8 that the jury verdict was not destroyed. Here the Ninth Circuit vacated the Judgment but expressly preserved the verdict of the jury and authorized the Trial Court to reinstate the Judgment in the event of a probation violation. This leaves the verdict unimpaired and ignores the possibility of adverse collateral consequences which may flow from the existence of an adverse jury verdict in a criminal case. In *Sibron vs. New York,* 392 U.S. 40, 20 L. Ed. 917, 88 S. Ct. 1889 (1968), this Court clearly recognized the "obvious fact of life that most criminal convictions do in fact entail adverse collateral, legal consequences." The "limbo" nature of the action of the Circuit Court in this instance is even more frustrating. Its precise effect is impossible of ascertainment. Myriad government forms require full disclosure of a past criminal record, with a complete explanation being called for if any type of conviction exists. Persons who have been convicted of a felony, for instance, are barred from liquor licenses under the laws of some states. See Arizona Revised Statutes 4-202D in appendix. Automobile insurance companies are concerned about convictions. More particularly in point U. S. Securities Exchange Commission form BD, Ap-

plication for Registration as a Broker-Dealer in paragraph 16 (b) requires an answer to the following question:

> "* * * has been convicted within ten years of any felony or misdemeanor (1) involving the purchase or sale of any security (2) arising out of the conduct of the business of a broker, dealer or investment advisor; (3) involving embezzlement, fraudulent conversion or misappropriation of funds or securities; or (4) involving violation of §1371; 1372 or 1343 of Title 18, United States Code (mail fraud, fraud by wire (including telephone, telegraph, radio or television))."

2 CCH Fed. Sec. L.Rep. ¶32,702.

Any affirmative answer requires a full explanation.

The same form bears the notation that intentional misstatements or omissions of fact constitute Federal criminal violations (See 18 U.S.C. 1001 and 15 U.S.C. 78 ff(a)).

If Defendant Fishbein made application for registration as a broker/dealer as above, he would be hard put to furnish an intelligent answer with respect to the vacated counts.

This Court should resolve the question of whether the Federal Appellate Courts have the power to refuse to decide and then hold in abeyance decisions on criminal matters when every facet of modern life requires individuals to make full disclosure of their status with regard to crimes and offenses charged against them. It appears that the action of the Circuit Court is totally inconsistent with the many forms and regulations required by the United States and the several states thereof regulating life in the latter half of the twentieth century.

2. *The Action of the Court of Appeals for the Ninth Circuit in Vacating the Judgment and not the Verdict is not Authorized by 28 U.S.C. §2106 and This Court Should Exercise its Supervisory Power to Prevent the Unvacated Jury Verdict From Spawning any Legal Consequences.*

28 U.S.C. §2106 authorizes the Federal Appellate Courts to, inter alia, vacate any judgment lawfully brought before it for review.

It appears that under the general law the vacation of judgment destroys it in its entirety. *Krummel vs. Hertz,* 222 SW 2d 574 at 578 (Mo. 1949). 49 C.J.S., Judgment, §306, pge. 558. And that the setting aside of a judgment based on the findings of a jury operates to set aside the verdict and to grant a new trial. *Smith vs. Thornton,* 29 SW 2d 314, 315 (Tex. 1930). The term "vacate" should be given its general legal meaning, and presumably The Congress, in enacting 28 U.S.C. §2106, intended the word "vacate" to be used in acceptable legal fashion. Hence, this Court should act to see that the Courts of Appeal so interpret the statute.

Finally, in this connection, the right of a citizen to his day in Court has never heretofore been circumscribed by the fact a Federal Court of Appeals believed: " *** That the interests of justice are better served if this Court turns its attention to the many real and pressing problems before it which cry for an early solution, rather than to engage in the vast labor necessary to solve, on this appeal, what now appear to be almost academic problems." Surely the right of an individual in our society cannot be discarded in such a fashion.

3. ***The Failure to Resolve 13 of 15 Remaining Counts on the Indictment Taints the Jury's Verdict with Respect to the 2 Counts Sustained (this argument applies with equal force to the counts sustained as to both Petitioners (1 and 3 as to Fishbein and 1 as to Yordon)).***

Concerning the conspiracy charge, count 1, the Appeals Court observed with respect to the sufficiency of the evidence to support the conviction that "the problem is not without difficulty." Likewise, the other count sustained, count 3, was sustained by the invoking of the recognized rule that the evidence after the conviction must be viewed in the light most favorable to the Government. Concerning Yordon, he was convicted at the trial on counts 1; 2; 4 and 8. The Appeals Court found the evidence insufficient to support the convictions of counts 2; 4 and 8; yet by a process of devious reasoning, the Court found the evidence adduced on count 8 sufficient to sustain a conviction of Yordon on count 1.

It is Petitioners' contention that in a conspiracy case, where the evidence is weak, the finding that other counts are not sustained by the evidence, or where counts are unresolved, the "spill-over" effect of having permitted the jury to deliberate concerning counts where there is insufficient evidence, or by an appellate court not determining whether the evidence or other errors would invalidate other counts, prejudices the counts upon which the jury did convict. To put it plainly, if the vacated counts as to Fishbein had been kept from the jury, and if Yordon's case had gone to the jury on count 1 alone, there is more than a fair possibility convictions would have not been had on any counts. This principle is not without precedent. The fact that error cannot be quarantined and restricted to certain

counts was recognized in *United States vs. Barash,* 365 Fed. 2d 395 (2d Cir. 1966), and the Second Circuit felt the jury might have exercised its prerogative of leniency but for the "spill-over" effect of other counts which were reversed on appeal.

Certainly that is a fair possibility here. Especially since on the record some 13 counts are unresolved as to Fishbein.

4. *The Failure of the Prosecution To Make Timely Discovery of Material which was Partially Exculpatory in Nature and of Substantial Value in Preparation for the Crossexamination of Material Government Witnesses.*

As said in the statement of the case, certain investor questionnaires were utilized in obtaining the indictment, although because of no Grand Jury minutes or transcripts, the existence of these questionnaires was unknown to these Defendants. When, more by inadvertence than design, their existence was discovered midway through the trial, the Court ordered them produced for the defense (Trial Transcript 729). Again, as shown supra, in the Statement of the Case many of these questionnaires contained exculpatory remarks. Certainly they would have been the basis for the defense investigation as would transcripts of Grand Jury testimony. Yet, at the point and time when they were made available, they were of minimum value. Effective use of background information was made in the case of four Government witnesses on counts 16; 17; 18 and 19, and acquittals were had on these counts. It is Petitioners' opinion that favorable information on the investor questionnaires, as well as all of the questionnaires, should have been produced pretrial, as ordered by the Trial Court. This material, all informative and some favorable, was in effect deliberately

withheld until too late. It was indeed a "storehouse of relevant fact" to which the Government had exclusive access until midway through the trial. *Dennis vs. United States,* 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). As was observed in that case, it is rarely justifiable for the Government to have such exclusive access. This information was a "Brady-type" material. (*Brady vs. State of Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)), and the withholding was of a more culpable nature than *United States vs. Keogh,* 391 F. 2d 138 (2d Cir. 1968), where the withholding was by inadvertence. The defense of Petitioners was unduly hampered by the failure to produce, viz: First, that since this material was furnished to the Grand Jury through the hearsay utterances of another it was secret, as it could not be reached by any discovery process. Secondly, the favorable portions would have furnished a source of defense witnesses whose existence was not even suspected. It is not for the Government to control thusly the trial strategy of the defense.

5. ***Whether the Court of Appeals for the Ninth Circuit was in Error in Failing to Consider the Neglect of the Trial Court to Give an Accomplice Instruction Especially in View of the Holding of Other Circuit Courts.***

Trial documents in counsel' hands indicate Defendants' proposed instruction No. 12 (reproduced in the appendix) was requested but not given. The trial transcript, at page 1712, notes an exception to the refusal to give the instruction. The Court of Appeals declined to consider this assignment of error on the basis no instruction had been requested (and on the rehearing that if requested, withdrawn, and no exception taken) citing *United States vs. Jones,* 425 F. 2d

1048 (9th Cir. 1970). While it is the position of the petitioners that an accomplice instruction was requested, the Fifth Circuit has held in *Williamson vs. United States,* 332 F. 2d 123 (5th Cir. 1964), that in a situation where the evidence is close, the instruction on accomplice testimony must be given; that in the last analysis the responsibility for a proper charge rests upon the Court and this cannot be escaped by blaming counsel. Here, by the Ninth Circuit's own finding, the case is a close one. Yet the Ninth Circuit, finding no request nor exception, holds that the failure to give the charge was not error. Here Gottfreid entered his plea of nolo, treated as a guilty plea, on September 29, 1967 was sentenced to a fine and given probation on October 23, 1967. Tropp plead nolo contendere on June 24, 1968 and on the day the trial started, July 17, 1968, was given probation. Both testified as Government witnesses. It is submitted there is a basic conflict in legal philosophy between the Ninth Circuit and the Fifth Circuit which should be resolved in the interests of justice, and that this Court should decide whether or not, in a close case, an accomplice instruction is required, regardless of a request or an exception to a refusal to give the instruction.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SAM FORD FISHBEIN and
LEONARD M. YORDON,
Defendant-Appellants.

No. 23,732

[July 28, 1971]

Appeal From the United States District Court
for the District of Arizona

Before: ELY and CARTER, Circuit Judges, and SMITH*, District Judge.

SMITH, District Judge.

AS TO FISHBEIN

Sam Ford Fishbein, convicted on Count 1 (Conspiracy), 18 U.S.C. § 371, Counts 2 to 8, and 10 to 15 (Fraud in the Sale of Securities), 15 U.S.C. § 77q(a) and Count 21 (Use of Mails to Defraud), 18 U.S.C. § 1341, of a 22-count indictment, appeals.

In June, 1961, a group consisting of Fishbein and four others acquired interests in six motels, two of which were located in Phoenix, and one each in the cities of Tucson, Houston, Tulsa, and San Diego. The

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

purchase price was $4,000,000.00, of which $325,000.00 was paid down and the balance secured by mortgages on the purchased property. This group then organized the HiwayHouse Hotels, Inc. (hereafter HiwayHouse) and transferred the motels to it in exchange for 150,000 shares of common stock, par value $1.00 per share. The corporation then offered to the public 225,000 shares of common stock at a price of $4.50 per share. HiwayHouse itself employed a group of salesmen and conducted the promotion.

HiwayHouse did not prosper. From the beginning it operated with substantial losses. Within the period between the date of its incorporation and November, 1963, the retained earning deficit was $1,148,156.31. In November, 1962, HiwayHouse lost its Houston property. As of September, 1962, an audit showed that it had sustained losses in the Tucson operation of $110,374.22 in the period between August 1, 1961, and December 31, 1961. At that time it had been recommended to the corporation that it abandon the Tucson HiwayHouse lease, which it was able to do under somewhat peculiar terms of the lease. In March, 1963, it did abandon the Tucson properties. Early in 1964 it lost all of the properties and its stock became worthless.

The evidence warranted a finding by the jury that almost from the beginning and continuously until November, 1963, the officers of HiwayHouse diverted funds to themselves, used corporate funds to supply personal needs, diverted HiwayHouse funds to corporations, the stock in which was owned by HiwayHouse officers, including Fishbein, and also pledged the credit of the corporation in behalf of these same officer-owned corporations.

For use in the sale of stock of HiwayHouse a prospectus was issued on October 3, 1961, another one on November 28, 1961, and still another on October 11, 1962. All of the prospectuses issued carried an August 1, 1961, balance sheet. All of them in the paragraph entitled "Transactions With Management" contained nothing more than a description of the formal stock arrangement existing between the company and its promoters and revealed nothing of the cash flow between the corporation and its officers, and nothing with respect to the relationship between HiwayHouse and corporations which were owned and controlled by the officers of HiwayHouse. All of them described the initial six properties, although it is fairly inferable from the record that prior to the issuance of the prospectus in October, 1962, the officers knew that the Tucson property would be abandoned, and also knew that the Houston lease was in default. In any event, after March, 1963, the date upon which the Tucson property was finally abandoned, the prospectus was false and its use misleading.

Fishbein became an executive vice president of HiwayHouse and its chief executive officer in November, 1961, and on January 15, 1962, he was made president. The evidence warrants a finding that he knew of some, if not all, of the dealings between the officers and the corporation, that he knew of the deteriorating financial condition of the corporation, and that he knew that the properties at Tucson and Houston had been lost. He knew that the prospectus was being used by the salesmen of HiwayHouse in the sale of its stock.

It is urged that there was insufficient evidence to prove a conspiracy with respect to Fishbein. The problem is not without difficulty, but the necessary agreement can be inferred from the proved facts, and that

is sufficient. *United States v. Bates,* 429 F.2d 557 (9th Cir. 1970); *United States v. Jones,* 425 F.2d 1048 (9th Cir. 1970). Fishbein and the others did agree to the organization of HiwayHouse and the public offering of its stock. They agreed upon the plan of selling the stock by the HiwayHouse sales force. They participated in and knew of the diversion of HiwayHouse funds. It may be inferred that the various defendants did not want their dealings with the corporate funds and credit made public and tacitly agreed upon the content and use of the prospectuses which failed to adequately reflect those dealings. It may also be inferred that they agreed to use the August, 1961, balance sheet in the prospectuses which bypassed any reflection of the financial transactions between the officers and the corporation and concealed the corporate losses which had occurred in the interim. From all of this we believe that a jury might properly conclude that there was a conspiracy to commit a fraud in the sale of the corporate securities and that this conspiracy included the use of the mails.

It is next urged that, there having been a conviction on the conspiracy charge, the Government should be precluded from prosecuting the substantive offenses. This rule has been advocated[1] but it is not the law except under circumstances which are not pertinent in view of our disposition of the case as to Fishbein. *Pinkerton v. United States,* 328 U.S. 640 (1946); *Callanan v. United States,* 364 U.S. 587 (1961).

Fishbein was convicted on Count 3 of the indictment charging fraud in the sale of securities to one Peterlin, in violation of 15 U.S.C. § 77q. The second prospectus

1 *See* the concurring opinion of Justice Jackson in *Krulewitch v. United States,* 336 U.S. 440 (1949). *See also* Judge Ely's separate concurring opinion in *United States v. Vaught,* 434 F.2d 124, 125 (9th Cir. 1970).

was delivered by mail to Peterlin. At the time of his purchases in June and July, 1962, Prospectus No. 2 was at best misleading. Although it indicated that the officers were serving without compensation, substantial sums had been paid to them without any corporate authority. Substantial obligations had been incurred which were not shown. False and misleading statements were made to Peterlin by both Wagner (the Sales Manager) and Fishbein. As a result of all of this Peterlin purchased 1300 shares of stock for $6,140.00. In our opinion the evidence viewed in the light most favorable to the Government was sufficient to warrant the conviction on Count 3.

We direct that the judgments of conviction be vacated as to Counts 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, and 21, said judgments to be reinstated if Fishbein shall violate the terms of his probation as to Count 3. We do this without passing upon the multiple problems of fact and law which we would be required to examine were we to dispose of these counts on the merits. Our reasons are these:

The judgment in this case fined the defendant $5,000.00 on Count 1 and then provided "that the imposition of sentence as to imprisonment only is suspended and defendant placed on probation for a period of two (2) years" on the remaining counts. The effect of what we do is to maintain the fine on Count 1 and the judgment of conviction as to Count 3. We do not vacate the jury verdict but in effect confirm the Court's suspension of the imposition of sentence on the counts as to which judgment is vacated. See *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970). If Fishbein should violate the terms of his probation, the District Court may reinstate the judgment

as to the vacated counts and then in its discretion make the sentences on Count 3 and the then restored counts run concurrently or consecutively. In either case the judgments will be subject to appellate review. Were the sentences imposed to run consecutively on some counts, this Court could then examine the convictions as to those counts only and refuse to review where concurrent sentences had been imposed (*United States v. Newton,* No. 25660, decided May 11, 1971, Circuit 9; *United States v. Washabaugh,* No. 25971, decided April 28, 1971, Circuit 9), or it could review the concurrent sentences if it thought that they visited upon the defendant adverse collateral consequences (*Benton v. Maryland,* 395 U.S. 784 (1969); *United States v. Washabaugh, supra*).

This appeal as it relates to the counts as to which judgments are vacated bristles with difficult legal and factual problems. The factual problems arise on an unindexed record[2] consisting of 2,154 pages and about 240 exhibits. To get to the merits we would need to examine the record to determine the sufficiency of the evidence as to each count. We would be largely unaided by the briefs[3] which attempt to deal with the factual problems in general terms and without transcript references to the items of evidence which prove the separate elements of each count. By this order appellant loses nothing and the Government loses only the additional record of conviction of a man already convicted of offenses arising out of the same general transaction. Under these circumstances we believe that the interests of justice are better served if this Court

2 In this regard the record is prepared without any semblance of compliance with Rule 4(d), par. 2 of the Rules of this Court.

3 There is but a token compliance by all parties with Rule 28 of the Rules of Appellate Procedure with respect to transcript references.

turns its attention to the many real and pressing problems before it which cry for an early solution, rather than to engage in the vast labor necessary to solve on this appeal what now appear to be almost academic problems. We take this course upon the authority of *28 U.S.C. § 2106*[4] adopting the considerations expressed in *United States v. Hooper, supra.*

We turn now to the asserted errors which would affect the convictions on Counts 1 and 3.

It is urged that the Government withheld exculpatory information from the defendant in violation of the rule of *Brady v. Maryland,* 373 U.S. 83 (1963). We heretofore remanded this case so that the District Court might determine factually whether there had been such a violation. On remand the District Court held a hearing, took evidence, and made findings of fact and conclusions to the effect that the defendant's rights under *Brady v. Maryland, supra* had not been violated. We agree with those findings.

Complaint is made that there was a deliberate failure to keep Grand Jury minutes, depriving defendants of the right to know what transpired before the Grand Jury. There is no requirement that Grand Jury minutes be reported. *(Loux v. United States,* 389 F.2d 911 (9th Cir. 1968), *cert. den.* 393 U.S. 867) even where there is a prior request therefor *(United States v. Thorsen,* 428 F.2d 654 (9th Cir. 1970)). In view of the broad rights of discovery which appellant was accorded in this case we see no reason to invoke the possible exception noted in *United States v. Thoresen, supra.*

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4 "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (28 U.S.C. § 2106.)

It is urged that because the indictment alleges a conspiracy to violate three separate statutory provisions it cannot be known in the absence of special interrogatories that the jury unanimously voted for conviction on any one of the three statutory provisions involved. It is true that the indictment does charge a conspiracy to violate 15 U.S.C. § 77q(a) (using the mails to defraud in the sale of securities), 15 U.S.C. § 77e (using the mails or instruments of interstate transportation to sell or deliver unregistered securities) and 18 U.S.C. § 1341 (mail fraud). The jury was charged that the conspiracy count involved violations of the substantive crimes described in the statutes above noted.

No request for special interrogatories was made to the trial court, but actually the verdict form which submitted the substantive counts to the jury performed the function of a special verdict. The jury found the defendant not guilty as to all of the substantive counts involving the sale and delivery of unregistered securities (15 U.S.C. § 77e). The jury did convict Fishbein on thirteen counts of fraud in the sale of securities (15 U.S.C. § 77q(a)) and on one count of mail fraud (18 U.S.C. § 1341). It is clear, therefore, that the jury believed that the defendant violated two of the statutes defining the substantive offenses and did not violate the third. Under these circumstances we refuse to speculate that some jurors among the twelve who unanimously voted for acquittal on the 15 U.S.C. § 77e count based their conspiracy verdict upon a violation of the law which they had rejected as to the substantive counts and then failed to agree on the 15 U.S.C. § 77q and 18 U.S.C. § 1341 violations upon which they had agreed as revealed by the verdicts on the substantive counts.

It is urged that the failure of the trial court to instruct that the testimony of an accomplice should be viewed with caution requires a reversal although no request for such an instruction was made. No reason appears why we should now depart from the rule that the failure to give such an instruction in the absence of a request is not plain error. *United States v. Jones, supra.*

It is urged that the argument of the United States Attorney, which was florid and studded with figures of speech, was so prejudicial as to require a reversal. If the argument was unfair, and we do not so find, we do not think that it had the effect of depriving the defendant of a fair trial and our judgment in this is confirmed by the fact that some defendants at whom the same argument was directed were acquitted by the jury and that the defendant Fishbein was acquitted on some of the counts in the indictment.

It is urged that the fine of $5,000.00 was excessive in view of the fact that a permitted fine under 18 U.S.C. § 1341 charging mail fraud is but $1,000.00. Counsel overlook the fact that the conviction on Count 1 is for conspiracy and that a fine up to $10,000.00 may be imposed (18 U.S.C. § 371).

Claim is made that the Court erred in limiting the cross-examination of the witness Joe Lampe. Had the cross-examination been pursued and had it been successful, it would have shown that Lampe, who managed HiwayHouse after Fishbein left, was not loyal, that had he been loyal HiwayHouse might have prospered, and had it prospered there would as a practical matter have been no prosecution. The trial court was obviously correct.

Fishbein and Yordon were represented at the trial by the same attorney. It is now urged that there was a conflict of interest which requires a new trial. No request for separate counsel was made in the trial court and there is nothing to suggest that the defendants themselves did not agree upon and pay for the joint representation. Both defendants were ably defended and the record does not disclose any conflict of interest. Since both were charged with the conspiracy, it was in their joint interest to resist proof of the conspiracy. Since Fishbein was sought to be held on all of the substantive counts, except possibly Count 3 (which did not involve Yordon), on some sort of vicarious basis, it was in his interest to prove that Yordon was innocent of the substantive crimes with which he was charged. No conflict appears from the record. Neither Fishbein nor Yordon gave testimony incriminating the other. It is not error *per se* to deny the request of an accused for independent counsel (*Glavin v. United States,* 396 F.2d 725 (9th Cir. 1969); *Watkins v. Wilson,* 408 F.2d 351 (9th Cir. 1969)), and certainly until some conflict appears, a trial judge is not required to interfere with a relationship which the defendants have themselves created.

It is urged that the Court erred in instructing the jury that the stock was a security. Stock is by law a security (15 U.S.C., § 77b). In some cases there may be a question of fact whether a thing sold is a security (*SEC v. Joiner Leasing Corporation,* 320 U.S. 344 (1943); *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961)), but there was no fact question here.

AS TO YORDON

Leonard M. Yordon was convicted on Counts 1, 2, 4, and 8 of the same 22-count indictment. The opinion

dealing with Fishbein disposes of the contentions common to both defendants, and we consider here only those asserted errors peculiar to Yordon.

Yordon was employed as a minor executive at a salary ranging from $500.00 to $800.00 per month at HiwayHouse during the whole of the stock sales campaign. He made approximately 80 separate stock sales and received about $5,000.00 in commissions (in addition to salary). He used the prospectuses which had been prepared. Viewing the evidence in the light most favorable to the Government, the jury could infer from Yordon's close connections with the executives and the other salesmen and his own sales efforts that he was aware that the mail was used to solicit purchaser inquiries and that the post stock sale mailings were used for the purpose of maintaining a continuing relationship with the buyers, many of whom did in fact make additional purchases. All of the substantive counts were incorporated by reference into the conspiracy count. Count 8 refers to the Lenards, and as to them the record shows that they were solicited by mail to inquire about the stock and did so; that in June, 1962, they purchased 500 shares from Wagner, the Sales Manager, who after the sale wrote them a letter acknowledging the purchase price and mentioned the Tucson property as one of the assets of the Company. Later on Wagner and Yordon called upon the Lenards, told them that only a few shares of stock were unsold (which was not true) and that the stock would be put on the market as soon as the last share was sold. Yordon testified that he had given the Lenards a prospectus. As of that time the prospectus was false and Yordon knew it. The Lenard's bought an additional 250 shares and Yordon received a commission on the sale. From all of this we believe the jury was

warranted in finding that Yordon became a member of a continuing conspiracy and that the Lenard sale was accomplished as a result of that conspiracy.

We deem the evidence insufficient to support the convictions as to Counts 2, 4 and 8 of the indictment.

Count 2 charges an elaborate scheme to commit fraud in the sale of securities (15 U.S.C. § 77q(a)(1)) and names a number of individuals who bought stock. Yordon sold stock to some of these individuals. It is not alleged (although in some cases the proof shows the use of the mail) that there was any use of the mails as to any of the named individuals except one Helen Cook, and as to her it is specifically charged that the mails were used to deliver the stock certificate. The record does not show that the defendant had any connection with the Helen Cook sale or the mailing of the certificate to her, nor did he have any connection with Donato, the salesman who made the Cook sale, except their common employer.

With respect to Count 2, only if Yordon is vicariously liable for the acts of others can he be convicted. If he is vicariously liable it is because of his agreement to participate in the continuing fraud and it is that agreement which made him a part of the conspiracy and resulted in his conviction on Count 1. With respect to Count 8 (the Lenard sale) Yordon did not participate in the mailing which was completed long before he met the Lenards. Those mailings were not a part of the second sale to the Lenards unless related to it on the basis of a continuing scheme to defraud. It is on this basis that the conviction on Count 1 is sustained.

In short, everything which was required to be proved to support the conviction on Count 1 was required to

be proved to support the conviction on Counts 2 and 8. Under these circumstances the substantive counts became merged in the conspiracy count under the exception to the general rule stated in *Pinkerton v. United States, supra,* as follows:

> "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States v. Katz,* 271 U.S. 354, 355-356; *Gebardi v. United States,* 287 U.S. 112, 121-122."

Count 4 repeats by incorporation the scheme alleged in Count 2 and then describes the Montgomery sale. Yordon did make the Montgomery sale and there is evidence of fraud. Proof as to the use of the mails, however fails.[5] On direct examination Mr. Montgomery testified that he received the stock certificates through the mail. In answering a questionnaire used by the SEC in investigating the HiwayHouse matter, Mrs. Montgomery had stated that the stock was delivered in person. Confronted with her statement Mr. Montgomery on cross-examination testified:

> "Q. Does that indicate that your stock was delivered by somebody, rather than having received it through the mail?
>
> "A. It indicates that, yes, sir.
>
> "Q. Having looked at that, does that refresh your memory as to the way you got the stock—I mean the means of delivery?

---

5 Yordon argues that the mailing of a stock certificate after fraud has been accomplished is not sufficient under the statute. It is not necessary for us to reach that problem.

"A. I believe, I am not positive, but I believe it came by mail.

"Q. But the statement in that questionnaire is not correct, that it in fact came by mail?

"A. I don't know.

"Q. You are not for sure?

"A. I am not for sure."

There is nothing in the circumstances of the case which tends to confirm a mail delivery. The Montgomerys lived in Phoenix and some HiwayHouse communications were hand delivered to them. The HiwayHouse stock sales were centered in Phoenix and hand deliveries of stock certificates were often made to residents of that city. The jury had nothing but Montgomery's memory to rely upon and if he was unsure, then an essential of the crime was not shown beyond a reasonable doubt.

As to Fishbein the judgment is affirmed as to Counts 1 and 3, and it is ordered that the judgment of conviction as to Counts 2, 4 to 8, 10 to 15, and 21 be vacated to be reinstated in the discretion of the district court in the event of a violation of probation as to Count 3.

As to Yordon the judgment is affirmed as to Count 1 and reversed as to Counts 2, 4, and 8.

APPENDIX 2

DEFENDANT'S PROPOSED INSTRUCTION No. 12

"The testimony of an accomplice ought to be viewed with distrust. Your (sic) scrutiny of the testimony of an accomplice should be specially close, careful and rigid, and if you do not have a full and positive conviction that he is telling the truth you should disregard his testimony. *United States vs. Schanerman,* 150 F.2d 941 (3rd Cir. 1945)."

APPENDIX 3

ARS 4-202

A *

B *

C **

D. No license shall be issued to any person who, within one year prior to application therefor, has violated any provision of a spirituous liquor license theretofore issued or has had a license revoked. No license shall be issued or renewed to any person who, within five years prior to application therefor, has been convicted of a felony involving moral turpitude. No corporation shall have its annual license issued or renewed unless it has on file with the department a list of its officers and directors and any stockholders who own ten per cent or more of the corporation. No corporation shall have its spirituous liquor license issued or renewed if any of its officers or directors or any stockholders who own ten per cent or more of the corporation have within five years been convicted of a felony involving moral turpitude. As amended Laws 1961, Ch. 2, 1st S.S., §4; Laws 1962, Ch. 2, § 1; Laws 1967, Ch. 133, § 10.

Effective July 1, 1967.

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451-844—71

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-566

SAM FORD FISHBEIN AND LEONARD YORDON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-28) is reported at 446 F. 2d 1201.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1971. A petition for rehearing was denied on September 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals in affirming a judgment of conviction with respect to two counts but vacating the judgment of conviction with

respect to thirteen other counts on the condition that the judgment could, in the discretion of the district judge, be reinstated in the event of a probation violation, was improper and whether this is an appropriate stage at which to determine that question.

2. Whether the government withheld exculpatory information in violation of *Brady* v. *Maryland*, 373 U.S. 83.

3. Whether the trial court erred in not giving an instruction *sua sponte* on the weight to be accorded the testimony of an accomplice.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner Fishbein was convicted of conspiracy (Count 1), thirteen counts charging fraud in the sale of securities in violation of 15 U.S.C. 77q(a) (Counts 2–8, 10–15), and one count charging the use of the mails to defraud in violation of 18 U.S.C. 1341 (Count 21). Petitioner Yordon was convicted of conspiracy and three counts charging fraud in the sale of securities in violation of 15 U.S.C. 77q(a) (Counts 2, 4, 8). Fishbein was fined $5,000 on the conspiracy count; the imposition of sentence for the substantive offenses was suspended and he was placed on probation for two years on the remaining fourteen counts. Yordon was fined $1,000 on the conspiracy count and placed on probation for two years on the three substantive counts on which he was convicted. On appeal Fishbein's convictions on counts 1 and 3 were affirmed; the judgment of conviction as to the remaining counts was vacated, with the provi-

sion that it could be reinstated, in the discretion of the district judge, if Fishbein violated the terms of his probation as to count 3. With respect to Yordon, the judgment was affirmed as to the conspiracy count and reversed as to the other three counts (Pet. App. 15–28).

The evidence, which is not in dispute, is set forth in the opinion of the court of appeals (Pet. App. 15–19, 24–26). Briefly it showed that in June 1961, a group, consisting of Fishbein and four others, acquired an interest in six motels, two of which were located in Phoenix, Arizona, and one each in the cities of Tucson, Tulsa, Houston, and San Diego. They organized a corporation, HiwayHouse Hotels, Inc., and transferred the motels to the corporation in exchange for 150,000 shares of common stock with a par value of $1 per share. The corporation then offered 225,000 shares of common stock to the public at a price of $4.80 per share. Fishbein became vice-president of HiwayHouse in November 1961, and its president in January 1962. Yordon, Fishbein's brother-in-law, was hired as a minor executive and salesman to assist in selling the corporate stock.

In promoting the sales of its stock, HiwayHouse issued a prospectus dated October 3, 1961, containing a balance sheet dated August 1, 1961. The prospectus stated that the officers of the corporation served without "remuneration as such." Additional prospectuses were issued on November 28, 1961, and October 11, 1962, each containing the balance sheet dated August 1, 1961. The evidence at trial indicated that the

prospectuses contained false and misleading information in that they failed to reflect diversion of corporate funds by officers to their personal use, and diversion of corporate assets to other corporations whose stock was owned by HiwayHouse officers. As the court of appeals found, the evidence warranted an inference by the jury that "the various defendants did not want their dealings with the corporate funds and credit made public and tacitly agreed upon the content and use of the prospectuses which failed to reflect those dealings" (Pet. 18).

The evidence relating to Fishbein's substantive offense (count 3) showed that he made false and misleading statements to a customer who had received the November 1961 prospectus by mail and purchased 1300 shares of stock for $6,140.00. In making stock sales, Yordon used the various prospectuses, which he knew to be false, and was aware of the fact that the mail was used to obtain inquiries by prospective purchasers and to maintain a continuing relationship with the purchasers.

In vacating the judgment of conviction with respect to thirteen of Fishbein's substantive counts, while providing that the judgment on such counts could be reinstated if Fishbein violated the terms of his probation under the single substantive count affirmed on appeal, the court below relied on its general powers under 28 U.S.C. 2106.[1] In the event of reinstatement,

[1] "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it

the convictions under the thirteen counts would then be subject to appellate review (Pet. App. 19–20). The court of appeals noted that this disposition did not vacate the jury verdicts but, in effect, suspended the imposition of sentences. See *United States* v. *Hooper*, 432 F. 2d 604, 606 (C.A. D.C.). The court found that this mode of disposition did not harm the defendant and deprived the government only of an additional record of conviction; it stated: "Under these circumstances we believe that the interests of justice are better served if this Court turns its attention to the many real and pressing problems before it which cry for an early solution, rather than to engage in the vast labor necessary to solve on this appeal what now appear to be almost academic problems" (Pet. 20–21).

ARGUMENT

1.a. Petitioner Fishbein urges that the vacating of the judgment with respect to the thirteen counts ignores the possibility of adverse collateral consequences arising from unresolved convictions and is not authorized by 28 U.S.C. 2106. Since the convictions were conditionally vacated, there are no collateral consequences that can affect Fishbein as long as he does not violate the terms of his probation (*Berman* v. *United States*, 302 U.S. 211, 212–213); in that event, as the court below noted, the convictions will be subject to appellate scrutiny. Moreover, while we believe

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for review, and may remand the cause and *direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.*" (Emphasis supplied.)

the court of appeals' action in allowing for possible reinstatement at a later date was permissible under 28 U.S.C. 2106, it will be time enough to resolve that question when and if such reinstatement takes place.

b. Petitioners argue that the jury's verdicts on the counts which were affirmed were prejudiced by the possible error in the convictions which were vacated on appeal. The situation here, however, is not like that in *United States* v. *Barash*, 365 F. 2d 395, 403 (C.A. 2), certiorari denied, 396 U.S. 832, relied on by petitioners, where the Second Circuit, in finding error with respect to convictions on twenty-four of twenty-six bribery counts, held that it was far from certain that the error found did not have a "spill-over" effect on the remaining tw counts, and therefore deemed it necessary to reve e the convictions on the other two counts. Here no comparable "spill-over" was present. The court below properly found the evidence sufficient to sustain the conviction of both petitioners on the conspiracy count; the convictions on each of the substantive counts rested on independent evidence involving different investors and thus evidence introduced with respect to one count would not be likely to have a "spill-over" effect on the other counts. Indeed, the jury's ability to apply the evidence discriminately count by count is reflected by the fact that petitioners were acquitted on some of the substantive counts.

2. Petitioners contend that the government withheld exculpatory material in violation of *Brady* v. *Maryland*, 373 U.S. 83, by not making available prior to

trial questionnaires, prepared by the Securities and Exchange Commission, in the possession of the government. These questionnaires were sent to HiwayHouse investors and contained statements by investors regarding representations made to them by HiwayHouse representatives in the course of promoting the sales of HiwayHouse stock. Prior to its decision, the court below remanded the case to the district court for the purpose of conducting a hearing to determine whether the government's failure to make timely disclosure of the information in question necessitated the granting of a new trial. The district court conducted a hearing in June 1970 and denied a new trial on July 21, 1970.

The district judge found that all questionnaires relating to the conduct of the defendants named in the indictment were produced by the government prior to trial. In addition, defense counsel were advised of the existence of questionnaires unrelated to any of the defendants. During the trial, the government was ordered by the court to produce all questionnaires whether or not they related to any defendant named in the indictment. Following government compliance with the court's order, petitioners had three days within which to examine the additional questionnaires. No objection with respect to the questionnaires was made at trial and defense counsel employed the questionnaires in the cross-examination of six investor witnesses. It is thus clear, as the district judge concluded, that the materials relevant to the named defendants were presented to defense counsel "substantially prior to the time limit announced" in

Brady. Moreover, since the questionnaires indicated that investors had not been informed of certain financial and property losses incurred by the corporation, the trial judge correctly found that the questionnaires were incriminatory rather than exculpatory in nature.

3. Petitioners, relying on *Williamson* v. *United States*, 332 F. 2d 123 (C.A. 5), argue that the trial judge should have given an instruction that the testimony of an accomplice should be viewed with caution, even though no such instruction was requested, or, if it was requested, was apparently withdrawn. The court of appeals, however, properly determined (Pet. App. 23), that, in the absence of a request, failure of the trial court *sua sponte* to give an accomplice instruction was not plain error. See *United States* v. *Jones*, 425 F. 2d 1048, 1055–1056 (C.A. 9) and cases there cited, certiorari denied, 400 U.S. 823. In denying a petition for rehearing,[2] the court noted that proposed defense instruction No. 12[3] (see Pet. 12–13) did not

[2] The order denying rehearing was sent to this Court separately and is not included in the petition.

[3] Requested instruction No. 12 read as follows: "It is neither criminal nor unlawful to do or conspire to do that which the law does not prohibit but recognizes may be lawfully done without prejudice or injury to the United States or the state. Thus, when the government relies upon circumstances to prove a conspiracy or the devising of a scheme or artifice to defraud, the case comes within that class of cases where an intent different from the ordinary criminal intent must be

deal with the testimony of an accomplice, but that proposed instruction No. 5 (set forth at Pet. App. 29, but erroneously labeled as proposed instruction No. 12), which dealt with an accomplice's testimony, had apparently been withdrawn.

Although in exceptional circumstances, failure to give an accomplice instruction has been deemed plain error (see *Williamson, supra*), no such circumstances existed here. Unlike *Williamson* where the government's case was made entirely by the accomplice, whose testimony contained many inconsistencies, the government's case here was not founded solely or even largely on the testimony of petitioners' accomplices. To be sure, Sol Tropp and George Gottfried, originally indicted with petitioners, pleaded *nolo contendere* prior to trial and then testified at trial for the government. These men were, however, only two of more than fifty witnesses called by the government during the trial and their testimony constituted only a small portion of the government's evidence against petitioners. Under these circumstances, the refusal to give the instruction, if it was in fact requested and not withdrawn, was harmless error.

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shown. There must be a showing of a corrupt intent, that is, the conscious and intentional purpose to break the law. *Fain* v. *United States*, 209 F. 525 (8th Cir. 1913); *Landen* v. *United States*, 299 F. 75, 78 (6th Cir. 1924); *Fall* v. *United States*, 209 F. 547, 553 (8th Cir. 1913)."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SAM FORD FISHBEIN AND LEONARD YORDON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Petitioners submit their Reply to the Brief for the United States in Opposition:

FAILURE TO DISPOSE OF THE GUILTY VERDICT ON THIRTEEN COUNTS AS TO FISHBEIN AND THE EFFECT THEREOF

In the Brief in Opposition by the United States it is argued that no collateral consequences from the thirteen unresolved counts can flow to Petitioner Fishbein as long as he does not violate the terms of his probation. The United States cited *Berman vs. United States,* 302 U.S. 211, 212-213 (Opp. Brief 5). Berman deals only with the question of whether a judgment of the District Court, wherein the execution of sentence was suspended, was a final judgment for the purpose of appeal. This Court stated in *Berman*:

> "In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the

merits and leaves nothing to be done but to enforce by execution what has been determined."

It is submitted that the action of the Court of Appeals has precisely this effect. The jury verdict is left intact — and nothing remains to be done. At the completion of his probationary period Fishbein is left with a jury verdict of guilty on thirteen counts of the indictment. Petitioners' Petition detailed the fact that collateral consequences can and do arise from unresolved counts. *Sibron vs. New York,* 392 U.S. 40 demonstrates this Court's awareness of this problem. In effect, the United States tells this Petitioner that the only way he can obtain review is to violate the terms of his probation. Certainly this is not a desirable state of affairs.

THE EFFECT OF THE FAILURE TO FINALLY DISPOSE OF THIRTEEN COUNTS TAINTS THE JURY'S VERDICT ON THE REMAINING COUNTS

The United States argues that the fact that the Ninth Circuit found sufficient evidence to sustain the conspiracy count, as to both Petitioners, and one substantive count as to Fishbein, eliminates the possibility of "spill-over effect" from the unresolved counts. This begs the question. It is the "spill-over" with the jury that is the Petitioners' concern; not the "spill-over" as it affects the considered deliberation of Appellate Judges reviewing the evidence at leisure. As long as Petitioners are entitled to a trial by jury they are entitled to a trial on counts submitted to a jury, untainted by other counts which "bristles with difficult legal and factual problems." (Pet. App. 20). This is especially true in view of the finding of the Ninth Circuit that the problem of the sufficiency of

the evidence as to the conspiracy count "** is not without difficulty." (Pet. App. 17).

THE FAILURE TO MAKE TIMELY DISCLOSURE OF PARTIALLY EXCULPATORY MATERIAL

Petitioners cannot agree that their counsel was advised of the existence of questionnaires unrelated to any defendants. Their first awareness of this was midway through the trial. A fair sample of these questionnaires is before this Court in Appellant Exhibits 1-85 of the Supplemental Record on Appeal. Stated as plainly as we can, these questionnaires reveal the existence of persons who, in writing, expressed their feeling that the stock sale representations were not abnormal, outlandish or pressured sales. (Pet. 5). Naturally, these persons were not made the subject of counts of the indictment. They were persons who could have been called as defense witnesses and who, presumably, would have given favorable testimony. These persons were unknown prior to midway through the trial. If they had been known they could have been questioned, and a decision made whether or not to call them. Their information, as evidenced by Appellant Exhibits 1-85, was at least partially favorable. The Government knew of the existence of these witnesses and questionnaires and what they had said on the questionnaires. To argue that when these Petitioners found out about these witnesses, midway through the trial, they should have attempted to halt proceedings while they investigated their potential, is the height of impracticability, and its absurdity is evident to any trial lawyer.

It is specious to argue that the trial judge found on remand that the questionnaires had information as to non-disclosure of financial and property losses, and

this information was incriminating. It was not the questionnaires that Petitioners sought to introduce into the trial but the knowledge, feelings and thoughts of these witnesses as reflected by their representations in the questionnaires. This information was all exculpatory or partially exculpatory. The identity and state of mind of these investor witnesses (and by witnesses we do not mean persons called at the trial) was relevant and in the possession of the United States until ordered produced. A typical "storehouse of relevant fact" (*Dennis vs. United States,* 384 U.S. 855) which had been in the exclusive possession of the Government and concealed — perhaps by inadvertence. Petitioners' Counsel must take their chance that the United States could have benefitted by cross-examination of these witnesses. These Petitioners had the right to make their choice from the undisclosed witnesses, and this choice was denied them by the actions of the United States. As noted, certain witnesses were called by the United States and were effectively cross-examined, based upon information in their questionnaires, and the devastating nature of this cross-examination is typified by the fact that acquittals were gained on some of those counts. (Opp. Brief 7). It is not those produced witnesses who are the subject of Petitioners' Complaint but the unproduced witnesses and their knowledge.

It is submitted that the action of the United States in not identifying these witnesses and not furnishing pre-trial the questionnaires pertaining to them was most unfair.

THE FAILURE TO GIVE THE ACCOMPLICE INSTRUCTION

Apparently the failure to give the accomplice instruction presents an unresolved question of fact. The

record discloses an objection to the failure to give proposed instruction No. 12. Petitioners' retained copy of the instructions show instruction No. 12 to be the instruction printed in Appendix 2 of their Petition. The record of the trial shows the accomplice instruction to be No. 5, bearing the notation "withdrawn." Exceptions were made at the trial to the instructions by number, and it is logical to conclude that these Petitioners excepted to the refusal to give the instruction they numbered 12 in their retained copy. Some of present counsel were trial counsel and made the exception on page 1712 of the transcript. There is no independent recollection of withdrawing any request for the accomplice instruction, and no apparent reason exists for this withdrawal.

It is submitted that it is irrelevant that the coconspirators Tropp and Gottfried were only two of some 50 witnesses. Certainly a trial jury would be inclined to give great weight to persons presumably knowledgeable about the affairs of HiwayHouse.

It is submitted that the error was not harmless.

CONCLUSION

It is therefore respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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